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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD RAY McKINNEY,

Defendant and Appellant.

B246598

(Los Angeles County
Super. Ct. No. BA402293)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bob S. Bowers Jr., Judge. Affirmed.

Nikoo N. Berenji, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant, Donald Ray McKinney, appeals from the judgment entered following a jury trial which resulted in his conviction of second degree, commercial burglary (Pen. Code, § 459)¹ and his admissions he previously had been convicted of four felonies for which he served terms in prison or county jail within the meaning of section 667.5, subdivision (b). The trial court sentenced McKinney to seven years in county jail. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. Facts.

a. The prosecution's case.

At approximately 1:20 a.m. on September 5, 2012, Karla Rosales, who had just gotten off her shift as the manager of a supermarket, was walking to the bus stop at the corner of Crenshaw and Washington. Across the street from the bus stop is a small shopping center and Rosales noticed three individuals standing there. However, because she was talking to her boyfriend on her cell phone, Rosales paid little attention to them. Rosales then heard the sound of breaking glass. When she turned around and looked at the shopping center, she saw an African-American man wearing a black sweater and khaki pants using a metal object to break windows on a beauty supply store, then grab bottles of products from inside the store through the broken windows. The man carried the merchandise to two individuals sitting at the bus stop.

At some point the man who had been taking the merchandise from the store made eye contact with Rosales and began to approach her. Rosales, who was standing by a Starbuck's Coffee store, started to run toward a Jack-in-the-Box across the street from the beauty supply store and, as she did so, she called 911. The man stopped in the middle of the street and, as the lighting from street lamps and businesses in the area was good, Rosales was able to see him clearly and later identified him as McKinney.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

When McKinney apparently saw that Rosales was on her phone, he turned back and walked toward the shopping center. As Rosales stood in a gas station waiting for the police to arrive, she watched McKinney take more items from the beauty supply store and carry them to the two individuals sitting at the bus stop, who then placed them in a bag. After he had done that for the third time, police officers arrived. The two individuals who had been sitting at the bus stop began to walk south on Crenshaw, toward the gas station. McKinney, who was still in the shopping center, then too began walking down Crenshaw.

Rosales, who had been watching McKinney continuously throughout the entire incident, saw police officers detain him at the corner of the shopping center. Just a couple of minutes later, police detained the other two suspects. After the three individuals had been taken into custody, a second group of police officers arrived at the gas station from which Rosales had been watching and, after interviewing her, took her in a patrol car to an area south of the gas station where the three suspects were being held. From inside the police car, Rosales, who indicated she had not felt pressured to identify anyone, indicated McKinney was the individual who had broken the windows and reached inside the store.

Los Angeles Police Department Patrol Officer Marco Diaz and his partner, Officer Carlos Gonzalez, had responded to Rosales's call. The call, which the officers received at approximately 1:27 a.m., indicated a male Black was "smashing windows." When Diaz and his partner, who were in uniform and driving a marked patrol car, arrived at the location approximately five minutes later, Diaz saw McKinney walking in the crosswalk on Crenshaw toward Washington Boulevard. Because he matched the description of the individual given in the radio call, Diaz and his partner got out of their patrol car and took McKinney into custody. At that time, he was "acting nervous and . . . sweating profusely." Diaz then saw Rosales standing next to a pump in the gas station on the corner. She flagged the officers down and, after they spoke with her, Diaz and his partner drove south of the gas station, where they detained the two other individuals.

From one of those two individuals, Diaz recovered a plastic bag filled with “different colored scarves, gloves [and] hair products.”

After other officers arrived, Diaz went back to the gas station, picked up Rosales and transported her to the area where the three suspects were being detained. There, after the officer admonished Rosales that the individuals in custody had been detained for investigation and were not necessarily guilty of a crime, Rosales, without hesitation, identified McKinney as the man she had seen break the store windows.

Diaz and his partner went to the shopping center where McKinney had broken the windows of a business called Alice Beauty Supply. There, they found four or five windows which had been “smashed, with displays . . . sticking out from inside the [shop].” Just to the right of the entrance to the store “was a 5x5 rock” on the ground.

After the officers inspected the broken windows and shattered glass on the sidewalk, they telephoned the owner of Alice Beauty Supply, Aeli Pak. Pak arrived at the store a few minutes after 2:00 a.m. and observed police cars parked in front of the shop. She then saw that a number of windows at her store had been broken. When Pak had left the store at approximately 7:30 the evening before, the windows had been intact. There was some merchandise in the parking lot, such as scarves and gloves, which, when the police officers inquired of Pak, she indicated were items she sold in her store. In addition, Pak sold bottles of shampoo, conditioner and other hair care products which had been located just behind the windows. Some of those items were on the floor and a “pegboard,” on which merchandise had been displayed, had been damaged. After taking an informal inventory, Pak estimated she had lost between \$600 and \$700 worth of merchandise. Pak indicated she did not know McKinney and had never given him permission to go to the store and take items she was selling there.

In the meantime, Los Angeles Police Officer Edgar Bacilio had transported McKinney to the station. Bacilio placed McKinney in a holding tank, then later returned to the holding tank to escort McKinney to the area where he would be booked. McKinney had fallen asleep and, when Bacilio woke him, McKinney asked the officer

what had taken so long, then stated, “ ‘You will see, I will be out of . . . jail in no time.’
[¶] . . . [¶] [] ‘I know how to play the system.’ ”

b. *Defense evidence.*

Officer Gonzalez wrote the police report in McKinney’s case. Gonzalez, who had been working as Officer Diaz’s partner when they received the broadcast regarding Rosales’s 911 call, indicated he believed the report was an “accurate account” of what had happened that night.

Gonzalez testified that, after the three individuals were detained and placed in handcuffs, Rosales contacted Gonzalez at the gas station and told him, “ ‘That’s not the right person[.]’ ”² Rosales had also told the officer that she had seen a “burglary tool” which had been used to break the store windows. However, after reviewing his report, Gonzalez indicated Rosales had described the object used to break the windows as a “hard object.” She never referred to it as a “metal object.” Gonzalez had reported that when he and Diaz had later investigated the scene of the crime, Gonzalez found a “piece of brick” or “concrete or a rock” outside the windows of the store.

During the course of the investigation, Rosales told Gonzalez that she saw McKinney “removing items from inside the store and then transporting them to other suspects [who were sitting] by a bus stop.” Rosales, however, never mentioned “bottles” and there is no mention of “bottles” in the police report.

The officer noted that, from the outside of the store, there is a glass window, followed by a “metal security gate[,] followed by [a] wooden pressboard” display rack. Although it was the officer’s theory that McKinney “broke the window and reached in through the broken glass through the metal gate,” then through the pressboard “to grab the merchandise,” McKinney had no cuts or scrapes on his hands or arms and, at the time

² In the same report, Gonzalez had written that, when the officers initially detained McKinney and the other two suspects, Rosales had said, “ ‘That’s them, you have the right guys.’ ” In addition Gonzalez had written that, before she could be admonished at the field showup, Rosales had blurted out, “ ‘You’ve got the right guy[.]’ ”

of his detention, had not been wearing gloves or other protective clothing. In addition, no glass particles were found in McKinney's hair or on his clothes.

The police report indicated Officer Gonzalez had contacted the Crime Scene Division to see if they could send someone to the store to see if they could take fingerprints. Gonzalez, however, did not know if anyone from the division had responded.

With regard to surveillance cameras, Pak had told Gonzalez she had them in the store, but did not know how to operate the system and would have to contact someone else to give to the officer the tapes. However, Pak never provided the surveillance tapes.

2. Procedural history.

Following a preliminary hearing, an information filed in October 2012 charged McKinney with one count of second degree commercial burglary (§ 459). It was further alleged he previously had been convicted of seven felonies within the meaning of section 1203, subdivision (e)(4), which precluded a grant of probation, and seven felonies for which he served prison or jail terms within the meaning of section 667.5, subdivision (b).

McKinney requested a jury trial on the substantive offense. However, before trial began, immediately after counsel had announced their appearances, McKinney indicated he had a "conflict of interest" with his attorney and requested a *Marsden*³ hearing. After the court cleared the courtroom, McKinney indicated his counsel was the second attorney he had been assigned. The first lawyer had gone on vacation before his trial began, so his present counsel had taken over his case. McKinney indicated his counsel had not listened to him when he had requested that she make certain motions, that she had told McKinney to "shut up" and that she had called McKinney a "nigger."

In response, counsel indicated she had never told McKinney to shut up and had "never uttered the 'N' word." Counsel continued, stating she had spoken to McKinney "over video conference to explain the evidence against him. [During those

³ *People v. Marsden* (1970) 2 Cal.3d 118.

conversations,] McKinney [had been] very rude” When counsel conveyed to McKinney the People’s offer, “he seemed like he did not want to take it, so [counsel had] told him [they] would go to trial” Finally, counsel stated McKinney had never asked her to file a motion. Had he done so, she would have filed it.

After listening to McKinney and his counsel, the trial court determined “the relationship ha[d] [not] been poisoned to the point where . . . counsel [would] not be able to adequately defend [McKinney].” Accordingly, the trial court denied the *Marsden* motion.

After denying McKinney’s *Marsden* motion, the trial court gave McKinney and his counsel some time to confer regarding any motions he wished to have filed. After a pause in the proceedings, counsel indicated, although McKinney’s “maximum exposure” in the matter was 10 years in prison, he did not wish to accept the People’s offer of five years. He wished to go to trial. The court then set the matter for trial, which was to begin on December 13, 2012.

Before jury selection began, the prosecutor informed the trial court that two other suspects had been involved in the case. The prosecutor then requested that the court rule “that there not be any sort of argument made to the jury . . . speculating” with regard to where those suspects were. The trial court indicated it would instruct the jury that “what those other people pled to or were not held to answer on [was] . . . irrelevant.” The trial court then granted defense counsel’s motion to bifurcate the trial on the priors from that on the substantive offense.

During trial, an Evidence Code section 402 hearing was held with regard to a statement made by McKinney after he had been placed in a holding tank at the jail. When Officer Bacilio had gone to get McKinney to “process” him, McKinney had told the officer he was ready, then spontaneously said, “ ‘You will see, I will be out in no time. I know how to play the system.’ ” After the court took a short break to do research on the matter, it determined McKinney’s statement was relevant because it might “be indicating that he was in fact guilty or he was the person that should not [have been] picked up.” The trial court indicated, for those reasons, the statement would be allowed.

After the prosecution concluded its case, the trial court addressed McKinney and informed him he had the right to testify even if his counsel had advised him not to. After McKinney indicated he did not intend to testify, the trial court found he had “knowingly, expressly and understandingly waive[d] his right to take the witness stand.”

Defense counsel made a motion for entry of a judgment of acquittal based on insufficiency of the evidence pursuant to section 1118.1. The trial court, finding there was sufficient evidence to support a conviction of the alleged offense of burglary, denied the motion.

After the trial court instructed the jury and the prosecutor and defense counsel presented their arguments, at 10:55 a.m. on December 18, 2012, the jury began its deliberations. At noon, the jury indicated it had reached a verdict. Before taking the verdict, the trial court asked McKinney if, should the jury’s verdict be guilty, he wished to have the court try his alleged prior convictions. After McKinney indicated he wished to have the priors tried by the court, the court found he had “knowingly, understandingly, and intelligently waived his right to have” the alleged priors tried before the same jury which had determined whether he had committed the burglary. The trial court’s judicial assistant then read the jury’s verdict, which stated: “We, the jury in the above-entitled action, find the defendant, Donald Ray McKinney, guilty of the crime of second-degree commercial burglary, in violation of . . . section 459, a felony, as charged in count 1 of the information” The jury was polled and each of the 12 jurors indicated that this was his or her verdict. After the jurors left the courtroom, the trial court indicated trial on the alleged prior convictions and prison or jail terms would be held on the day of sentencing, January 16, 2013.

On January 16, 2013, the prosecutor indicated that, after McKinney’s counsel had received from the prosecutor “certified documentation” of McKinney’s priors, McKinney had decided he would stipulate to them. The prosecutor then informed McKinney that, at a court trial he had “the same constitutional rights that [he] had at [the] jury trial.” After indicating he understood his right to have a court trial regarding his alleged priors, McKinney waived that right then admitted having suffered each of the seven prior

convictions and serving each of the seven prison or jail terms alleged in the information. The trial court then found McKinney had “expressly, understandingly and knowingly waived his right to have a court trial in this matter” and accepted McKinney’s admissions.

After reviewing McKinney’s probation report and listening to both the prosecutor’s and defense counsel’s arguments, the trial court asked the prosecutor to strike three of McKinney’s prior convictions and prison or jail terms. After the three oldest priors were stricken, the trial court sentenced McKinney to the upper term of three years in county jail pursuant to section 1170, subdivision (h)(5)(A) for his conviction of second degree commercial burglary. The court indicated the upper term was warranted because McKinney was “an active participant in the crime,” had a “prior record of criminal conduct . . . indicat[ing] a pattern of regular and increasingly serious [crimes],” had performed unsatisfactorily on probation and parole, had been on parole when the present crime was committed and had shown no remorse. For his four remaining prior convictions and prison or jail terms, the trial court imposed a consecutive term of one year for each one, for a total sentence of seven years in jail.

The trial court awarded McKinney presentence custody credit for 134 days actually served and 67 days of conduct credit, for a total of 201 days.⁴ The court then ordered McKinney to pay a \$300 restitution fine (§ 1204.4, subd. (b)), a \$40 court security fee (§ 1465.8, subd. (a)(1)), two \$16 DNA penalty assessments (Gov. Code, §§ 76104.6, subd. (a), 76104.7, subd. (a)), a \$20 state court construction assessment (Gov. Code, § 70372), a \$40 penalty assessment (Gov. Code, § 70373) and an \$8

⁴ In a letter addressed to the trial court, McKinney’s appellate counsel informed the court that, pursuant to the Criminal Justice Realignment Act of 2011, under section 4019 McKinney was entitled to 134 days of conduct credit, rather than the 67 days awarded, for a total of 268 days of presentence custody credit. Counsel then requested that the trial court “prepare, file and forward to the Department of Corrections an amended abstract of judgment reflecting the correct amount of presentence credit.” In an abstract of judgment prepared on August 16, 2013 by the trial court’s clerk, the award of presentence custody credits was corrected to show 134 days of conduct credit, for a total of 268 days of credit.

criminal security charge (§ 1465.7). The court then set a date of January 29, 2013 for a hearing to be held with regard to direct restitution to the victim.⁵

McKinney filed a timely notice of appeal on January 29, 2013.

CONTENTIONS

After examination of the record, appointed appellate counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice filed September 5, 2013, the clerk of this court advised McKinney to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.

⁵ On January 29, 2013, while McKinney was in custody and not present in court, the prosecutor submitted an invoice from Pak which indicated she had paid \$700 for repair to the glass on the front of her store.